Supreme Court, U.S.
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No. 93-654

In The

Supreme Court of the United States

October Term, 1993

HOWARD R. RELIN, Individually,

Petitioner,

vs.

MELINDA C. FRANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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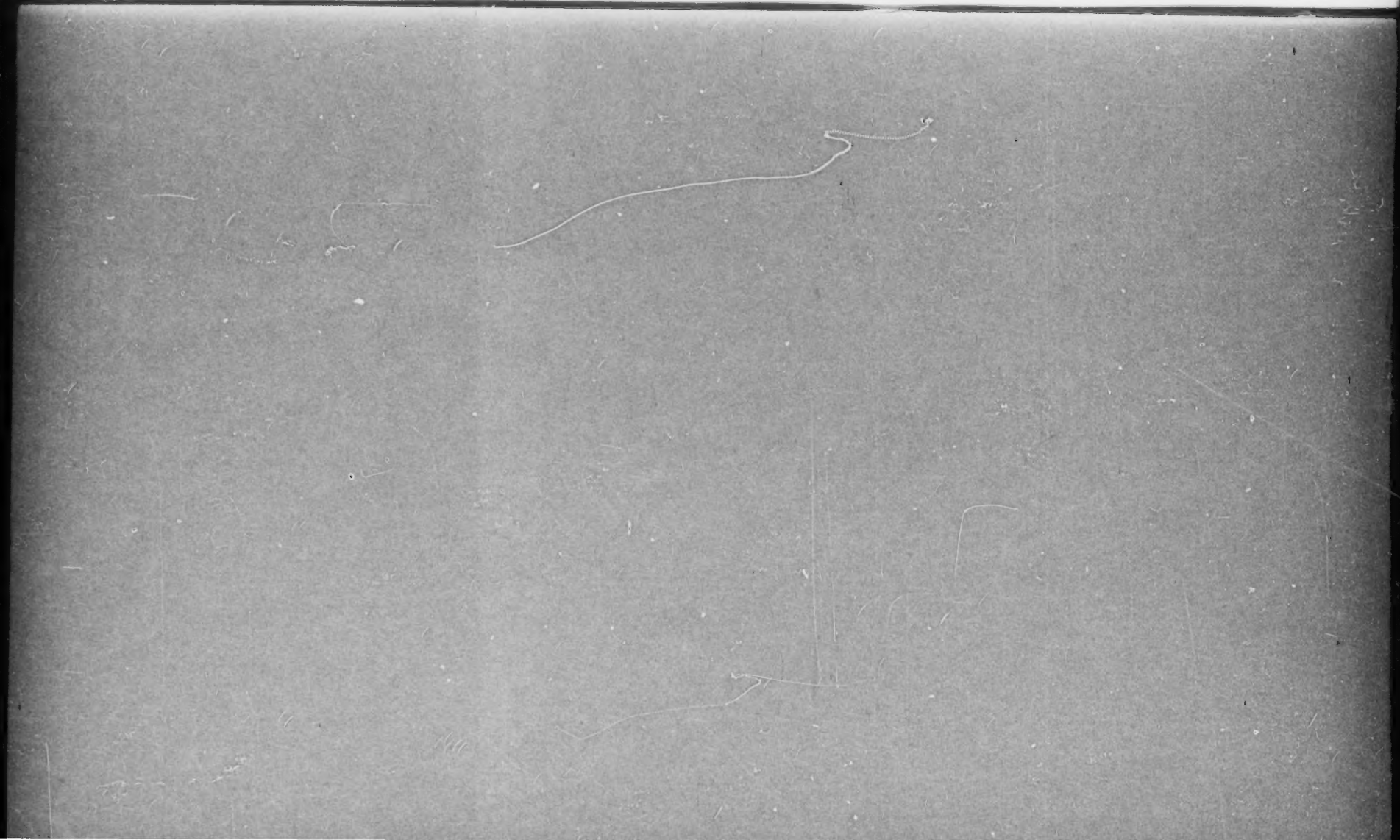

QUESTIONS PRESENTED

1. Whether a writ of certiorari is appropriate where the Court of Appeals correctly applied established precedent regarding qualified immunity, including the objective reasonableness test?

2. Whether a writ of certiorari is appropriate where the Court of Appeals' decision turned on summary judgment principles, and not on qualified immunity principles?

3. Whether a writ of certiorari is appropriate to review an issue never reached by the Court of Appeals below?

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STATEMENT OF THE CASE

The court below, the United States Court of Appeals for the Second Circuit, reversed a grant of summary judgment dismissing respondent's complaint. *Frank v. Relin*, 1 F.3d 1317 (2d Cir. 1993). Petitioner seeks review of the Second Circuit's decision by writ of certiorari. This brief is submitted on behalf of respondent in opposition to the petition for certiorari.

Respondent was employed by the Monroe County District Attorney's Office as victim witness coordinator. (Appendix A-3) Petitioner was the District Attorney. (*Id.*) In 1985, in the course of preparing witnesses in two cases, respondent was advised not to explore or investigate potentially exculpatory information which had come to her attention. Concerned about the implications of this advice, respondent spoke to a senior Assistant District Attorney in petitioner's office. (Appendix A-4-5) That Assistant District Attorney in turn brought this information to the attention of the supervisory judge of Monroe County criminal courts. When petitioner later learned what happened, he demanded respondent's resignation. (Appendix A-7)

In April of 1986, respondent commenced the instant action alleging two claims against petitioner in his official capacity under 42 U.S.C. §1983[1]; the claim pertinent to the instant appeal alleged that respondent's firing violated her First Amendment rights to speak on matters of public concern. (Appendix A-9) Following discovery, petitioner moved for summary judgment on the grounds that respondent's speech was not protected by the First Amendment. After a three-day hearing, the district court denied petitioner's motion for summary judgment ruling that respon-

[1] Respondent's second claim, that petitioner had deprived her of a property interest without due process of law, has been dismissed from the lawsuit, and was neither a subject of the Second Circuit's decision, nor the instant petition for certiorari.

dent's speech was about matters of public concern, and further that her speech outweighed petitioner's interest in the efficient administration of his office.

Thereafter, petitioner sought to raise the defense of qualified immunity by amending his answer. As directed by the district court, respondent first amended her complaint alleging a cause of action against petitioner individually. Petitioner then moved for summary judgment on grounds of qualified immunity and, notwithstanding its prior decision denying petitioner's original motion for summary judgment, the district court then granted summary judgment on the grounds of qualified immunity, and dismissed respondent's complaint in its entirety. (*See* Appendix B-1-16)

Respondent appealed to the United States Court of Appeals for the Second Circuit which held that the district court erred in granting summary judgment, because "the existence of fact issues made summary judgment inappropriate with respect to [petitioner's] qualified immunity defense . . . ." *Frank v. Relin*, 1 F.3d 1317, 1325 (2d Cir. 1993) (Appendix A-16) Accordingly, the Court of Appeals reversed the grant of summary judgment and remanded the case for further proceedings. Petitioner sought a re-hearing, but his application was denied. This petition for a writ of certiorari followed.

SUMMARY OF THE ARGUMENT

1. The opinion below did not break new ground, nor did it deviate from established precedent. Rather, the Court of Appeals applied This Court's objective reasonableness test under *Anderson v. Creighton*, 483 U.S. 635 (1987). Furthermore, there is no conflict among the circuits. Although petitioner cites cases from other circuits which have reached different results, those decisions resulted from different facts, and not the application of any different qualified immunity standard.

2. The Court of Appeal's opinion turned on summary judgment principles, not on qualified immunity principles. In short, the Court of Appeals merely held that the district court had engaged in impermissible fact finding.

3. Petitioner's second point, that respondent's claim is barred by the applicable statute of limitations, was never addressed by the Court of Appeals. In the absence of an opinion below, there is clearly no conflict among the circuits justifying certiorari. *See* Sup.Ct.R. 10(a).

ARGUMENT

POINT I

A WRIT OF CERTIORARI IS INAPPROPRIATE BECAUSE THE SECOND CIRCUIT CORRECTLY APPLIED ESTABLISHED PRECEDENT, INCLUDING THE OBJECTIVE REASONABLENESS TEST.

Contrary to statements in the petition for certiorari, the Second Circuit did not disregard precedent, nor did the opinion below break new ground. Rather, applying established law to the particular facts of this case, the Second Circuit merely held that, "there are questions of fact as to the reasons [petitioner] fired [respondent] and those questions affect both the merits and the qualified immunity defense." *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993) (Appendix A-26). Accordingly, because the Second Circuit opinion does nothing more than apply established precedent to the facts of this case, a writ of certiorari is inappropriate herein.

Quoting extensively from the district court opinion, petitioner suggests that the Court of Appeals failed to apply This Court's objective reasonableness test under *Anderson v. Creighton*, 483 U.S. 635 (1987). This is simply incorrect. The Second Circuit

opinion specifically states that petitioner was entitled to qualified immunity, "if it was objectively reasonable for the official to believe that his acts did not violate [respondent's] clearly established [first amendment] rights." *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir. 1993) (citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)) (Appendix A-23). Similarly, the Court of Appeals went on to state that, "even where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was *objectively reasonable* for him to believe that his acts did not violate those rights." *Frank v. Relin, supra* at 1328 (Appendix A-24) (emphasis added). Thus, the Court of Appeals cited and applied the identical law which is quoted in the petition for certiorari from the district court's opinion.

Similarly, petitioner's efforts to create a conflict among the circuits should be rejected, because petitioner's brief mischaracterizes not only the opinion below, but the purportedly conflicting decisions from other circuits. In *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989), the Court of Appeals held that defendants were entitled to qualified immunity for the firing of plaintiff. In applying the *Pickering* balancing test (*see Pickering v. Board of Education*, 391 U.S. 563 (1968)), the Eleventh Circuit concluded that, "the insulting nature of [plaintiff's] words gives his speech an element of personal as opposed to public interest." *Id.* at 1324. On the other hand, defendant was entitled to maintain loyalty, discipline and good working relationships among his employees. Therefore, under *Pickering* it could not be said that plaintiff's firing violated clearly established principles of law, and defendant was entitled to qualified immunity.

In the instant case, the Second Circuit applied the same qualified immunity analysis to the same *Pickering* balancing test. The result was different because the facts were entirely different.

"First, [respondent's] speech plainly centered on a matter of societal importance." *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir. 1993) (Appendix A-26). Contrary to the speech in *Dartland, supra*, which became personal in nature, plaintiff's speech in the instant case concerned whether relevant and material evidence was fully developed and made available to the prosecution and the defense, to enable defendants to obtain a fair trial.

On the other side of the scale, the Second Circuit held that petitioner could not establish, on the instant record, that respondent's firing was for legitimate reasons — namely, to promote office efficiency. "If the reason for the ADA's desire to be rid of [respondent] were a lack of trust in her ability or willingness to remain silent about *Brady* violations, office efficiency or morale grounded on such considerations could not outweigh [respondent's] speech, and a competent public official could not reasonably believe that it would." *Id.* at 1330 (Appendix A-28-29).

Therefore, the results in *Dartland, supra*, and the instant case, are different not because the two circuits applied different principles of law, but because the different facts in the two cases mandated different results. Under these circumstances, a writ of certiorari is inappropriate.

POINT II

A WRIT OF CERTIORARI IS INAPPROPRIATE BECAUSE THE SECOND CIRCUIT'S DECISION TURNED ON SUMMARY JUDGMENT PRINCIPLES, AND NOT ON QUALIFIED IMMUNITY PRINCIPLES.

Petitioner's argument must be evaluated in the procedural context of the case below. The district court dismissed plaintiff's complaint on the grounds of qualified immunity in response to petitioner's motion for summary judgment. On appeal, the Second Circuit reversed, ruling that, "the existence of fact issues

made summary judgment inappropriate with respect to [petitioner's] qualified immunity defense . . . ." *Frank v. Relin, supra* at 1325 (Appendix A-16).

The inappropriateness of summary judgment can be demonstrated by reference to a citation in the petition for certiorari. Petitioner quotes the district court which found that respondent's decision to speak out, "adversely affected the working relationships in the District Attorney's Office." (Petition for certiorari at 5; *see* Appendix B-13.) The Second Circuit correctly stated that the district court's, "attribution of respondent's firing to a desire to obtain office efficiency constitutes a finding of fact as to [petitioner's] motivation." *Frank v. Relin, supra* at 1330 (Appendix A-29). Furthermore, this finding directly contradicted a prior finding of the district court in its 1989 decision, which followed a three-day hearing on petitioner's initial motion for summary judgment. At that time, the district court concluded that there was, "no demonstration that [petitioner's] voicing of her concerns . . . seriously impaired her working relationship with other staff and attorneys in the office." (Appendix D-11.)

Contrary to petitioner's suggestion, the objectively reasonable qualified immunity test is not a license for district courts to engage in fact finding. Application of the qualified immunity doctrine requires that the court, "know what the facts were that the officer faced or perceived." *Warren v. Dwyer*, 906 F.2d 70, 77 (2d Cir.) (Winter, J. dissenting), *cert. denied*, 111 S.Ct. 431 (1990). In other words, the defense of qualified immunity applies where the facts are uncontested, but where the applicable law was unclear. On the other hand, where the law was clear, but the facts are in dispute, summary judgment cannot be granted on the basis of qualified immunity.

The Second Circuit's opinion turned on application of long standing and universally recognized summary judgment princi-

ples, not on any novel interpretation of qualified immunity doctrine. Accordingly, a writ of certiorari is inappropriate herein.

POINT III

A WRIT OF CERTIORARI IS INAPPROPRIATE TO REVIEW AN ISSUE NOT REACHED BY THE COURT OF APPEALS.

The second point in the petition for certiorari alleges that plaintiff's amended complaint naming petitioner in his individual capacity is barred by the statute of limitations. This issue was never addressed by the Court of Appeals. Although petitioner states that the argument was raised in his Second Circuit brief, it was never properly before the Court of Appeals.

Petitioner raised this argument in a motion to dismiss respondent's amended complaint. The motion was denied by the district court twice, first on the original motion and then on reargument. Later, when the district court dismissed plaintiff's amended complaint on grounds of qualified immunity, petitioner never cross-appealed to enable the Court of Appeals to consider the issue. Thus, the Court of Appeals' extensive opinion is silent as to this question.

Inasmuch as this issue was never addressed by the Court of Appeals, there is no conflict among the circuits justifying a writ of certiorari. *See* Sup.Ct.R. 10(a). Accordingly, the petition for certiorari should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: November 8, 1993

Respectfully submitted,

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